

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1029

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1029

UNITED STATES OF AMERICA
Appellee

v.

JOHN P. CLEARY
Appellant

APPENDIX OF APPELLANT

Appeal from the United States District Court
For the District of Vermont
Criminal No. 73-37



Peter M. Cleveland
Myers and Cleveland, Inc.
Box 123
Essex Junction, Vermont
05452

Attorney for Appellant
John P. Cleary

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INDEX TO APPENDIX

	<u>Page</u>
Relevant Docket Entries	1, 2
Indictment	3, 4
Exhibts 1, 2, 3 and 4	5, 6, 7, 8, 9, 10, 11, 12,
Defendant's Motion for Judgment of Acquittal at the End of the Government's Case	13
The Defendant Renewed His Motion for Judgment of Acquittal at the end of the Government's Case with Specificity	13, 14
Renewal of Defendant's Motion for Acquittal at the End of all of the Evidence and Defendant's Motion for Mistrial	14
Motion for Judgment of Acquittal Notwithstanding the Verdict or in Alternative for a New Trial	15
Court's Instructions	16, 17

RELEVANT DOCKET ENTRIES

1973

May 17 Filed Indictment for two counts of violation of T. 18, Sec. 922 (b) (3), United States Code Annotated.

June 8 Summons served on Defendant.

June 18 Arraignment before Judge James W. Holden, George W. F. Cook, U. S. Attorney; entered a plea of not guilty to both counts.

June 18 Bail hearing.

June 18 Appearance bond executed by Defendant.

June 18 Waiver of Defendant's presence executed by Defendant.

June 18 Ordered that bail for Defendant be fixed at \$5,000.00 and Defendant to be released on his own personal recognizance.

June 22 Filed Motion and Affidavit for Leave to Take a Deposition of Harold Anderson.

July 24 Trial by jury begun before Judge James W. Holden, George W. F. Cook, U. S. Attorney and William Grey, Assistant U. S. Attorney for the Government.

July 26 Defendant moves for Directed Verdict of Acquittal.

July 26 Defendant's Motion for Directed Verdict of Acquittal denied.

July 27 Renewal of Defendant's Motion for Judgment of Acquittal at the end of the Government's case.

July 27 Defendant's Motion for Judgment of Acquittal denied.

July 27 Government's Request to Charge filed.

July 27 Defendant's Request to Charge filed.

July 27 Defendant moves for Judgment of Acquittal at the end of the evidence.

July 27 Defendant's Motion for Judgment of Acquittal denied.

July 27 Defendant moves for a Mistrial.

July 27 Defendant's Motion for Mistrial denied.

July 28 At 10:18 a.m. the Jury retires to deliberate the case.

July 28 At 11:01 a.m. the Jury returns to the Court Room requesting to hear portions of the testimony of Agent Flynn and Trooper Anderson read.

July 28 At 11:06 a.m. the Jury retires to resume deliberations.

July 28 At 11:40 a.m. the Jury returns to the Court Room to deliver verdict.

July 28 Jury delivers verdict of guilty to each count.

July 28 Bail continued; Defendant released on his own personal recognizance.

July 28 Pre-sentence investigation ordered by the Court.

1973

Aug. 1 Defendant's Motion for Judgment of Acquittal
Notwithstanding the Verdict or Alternately for a
New Trial filed.

Oct. 15 Waiver of appearance of Defendant's presence executed
and filed.

Oct. 15 Hearing on Defendant's Motion for J.N.O.V. or in the
Alternative for a New Trial before Judge James W.
Holden, George W. F. Cook, U. S. Attorney for the
Government and Peter M. Cleveland, Esq.

Oct. 15 Motion for J.N.O.V. or in the Alternative for a New
Trial was denied.

Nov. 26 Sentencing before Judge James W. Holden, Gerald
O'Neil, Assistant U. S. Attorney for the Government,
and Peter M. Cleveland

Nov. 26 Defendant sentenced two years, suspended sentence and
\$1,000.00 fine, both counts concurrent.

Nov. 26 Judgment entered.

Nov. 26 Notice of Appeal filed.

Nov. 29 Notice of Appeal fee for U. S. District Court filed.

Dec. 4 Initial order of transcript.

Dec. 14 Original documents and index mailed to Clerk, U. S.
Court of Appeals for the Second Circuit, New York,
New York.

Dec. 20 Filing fee to U. S. Court of Appeals for the Second
Circuit.

Dec. 28 Motion for Leave to Docket the Appeal Out of Time
filed

1974

Jan. 7 Motion to Docket Appeal Out of Time granted.

Jan. 29 Motion for Enlargement of Time filed.

Jan. 30 Motion for Enlargement of Time denied.

Feb. 1 Motion for Enlargement of Time filed.

Feb. 1 Motion for Adjournment of Argument filed.

Feb. 7 Motion for Enlargement of Time denied.

Feb. 7 Motion for Adjournment of Argument denied.

Feb. 15 Transcript mailed from District Court Clerk to
Clerk, U. S. Court of Appeals for the Second Circuit.

Mar. 6 Subsequent transcript mailed from District Court
Clerk to Clerk, U. S. Court of Appeals for the Second
Circuit.

UNITED STATES OF AMERICA

v.

JOHN P. CLEARY

: Cr. 73-37
: Title 18,
: United States Code,
: Sec. 922 (b) (3),
: 921 (a) (11),
: 923

The Grand Jury charges:

On or about the 3rd day of May, 1973, at Williston, in the District of Vermont, JOHN P. CLEARY, the defendant, a person engaged in the business of selling firearms and ammunition at retail, and licensed to do business at the Powderhorn Gun Shop, Williston, Vermont, under the provisions of Chapter 44 of Title 18, United States Code, unlawfully, willfully and knowingly did sell and deliver a firearms, to wit, a 9 m.m. semi-automatic pistol handgun, to Richard C. Dotchin, a person who JOHN P. CLEARY, the defendant, knew and had reasonable cause to believe did not reside in the state of Vermont; in violation of Title 18, United States Code, Section 922 (b) (3).

A true copy,

ATTEST:

/s/ Edward J. Trudell

Clerk

ENDORSED: Filed May 17, 1973
Christine M. Wiberg,
Deputy Clerk

COUNT II

The Grand Jury further charges:

On or about the 3rd day of May, 1973, at Williston, in the District of Vermont, JOHN P. CLEARY, the defendant, a person engaged in the business of selling firearms and ammunition at retail, and licensed to do business at Powderhorn Gun Shop, Williston, Vermont, under the provisions of Chapter 44 of Title 18, United States Code, unlawfully, willfully and knowingly did sell and deliver a firearms, to wit, a .38 caliber revolver handgun, to Paul B. Flynn, a person who JOHN P. CLEARY, the defendant, knew and had reasonable cause to believe did not reside in the State of Vermont; in violation of Title 18, United States Code, Section 922 (b) (3).

A TRUE BILL

/s/ Isabelle Bainbridge
Foreman

/s/ Carter LaPrade
Carter LaPrade
Assistant U. S. Attorney

Date:

Department of the Treasury
Internal Revenue Service
Alcohol, Tobacco and
Firearms Division

Firearms Transaction Record

Intra-State Over-the-Counter

NOTE: Please read and carefully follow the instructions on the back

Transferor transaction
number

4406

Section A—Statement of Transferee or Buyer

1. Transferee's (buyer's) name (last, first, middle) (Mr., Mrs., Miss)	2. Height	3. Weight	4. Race
Anderson, Harold Jr.	5'10	170	Am
5. Address (number, street, city, State, ZIP code)	6. Date of birth	7. Place of birth	
10 Mountain View, - Chester, Vermont	9-21-42	Waterbury, Conn	

8. Certification of Transferee (Buyer)—an untruthful answer may subject you to criminal prosecution. Each question must be answered with a yes or no.

- a. Are you under indictment in any court for a crime punishable by imprisonment for a term exceeding one year? no
- b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year.) no

- c. Are you a fugitive from justice? no
- d. Are you an unlawful user of, or addicted to, marijuana or a depressant, stimulant, or narcotic drug? no
- e. Have you been adjudicated mentally defective or have you ever been committed to a mental institution? no
- f. Have you been discharged from the Armed Forces under dishonorable conditions? no
- g. Are you an alien illegally in the United States? no
- h. Are you a person who, having been a citizen of the United States, has renounced his citizenship? no

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand

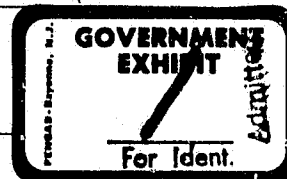
that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

Transferee's (buyer's) signature

* Harold Anderson Jr.

Date

3 May 73



Section B—Statement of Transferor or Seller

The person described in Section A, is known to me ☐, or has identified himself to me ☒ in the following manner:

9. Type of identification (driver's license, etc.)	10. Number on identification
Vermont Operators License	A14142718394092142

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is

not unlawful for me to sell, deliver, or otherwise dispose of the firearm described below to the person identified in Section A.

11. Type (pistol, rifle, etc.)	12. Model	13. Caliber or gauge	14. Serial number
Pistol	HS	380 Cal	01-13402
15. Manufacturer (and importer, if any)	16. Transferor's (seller's) signature	17. Transferor's title	18. Transaction date
Wm. S. Wadsworth	John P. Cherry - Powder Horn Gun Shop	Owner	3 May 73

Department of the Treasury—Internal Revenue Service

EXHIBIT-5(a)

Form 4473 Part I (Rev. 6-70)

Notice:

Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90 351, 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under Chapter 44

may determine if he may lawfully sell or otherwise dispose of a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms.

Definitions

1. Intra-State Over-the-Counter Transaction—The sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the State in which the transferor's business is located, occurring on the transferor's business premises.

2. Published Ordinances—The publication issued annually by the Director, Alcohol, Tobacco and Firearms Division, which contains the published local ordinances determined by him to be relevant to the enforcement of Chapter 44 of Title 18, U.S.C., which were published in the Federal Register.

Instructions

1. Only one Form 4473, Part 1, is required for each intra-State over-the-counter transaction.

2. All signatures required on this form must be in ink. All other entries on the form must be in ink or be typewritten.

3. The transferor (seller) of a firearm will, in every instance, obtain the information required to complete Section A of the form and have the transferee (buyer) sign the certification in that Section.

4. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business may sign the certification in Section A of the form and attach a written statement, executed under the penalty of perjury, stating

(a) that the firearm is being acquired for the use of and will be the property of that business entity, and

(b) the name and address of that business entity.

5. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

6. If more than one firearm is involved, the identification required by Section B, Items 11 through 15, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than one weapon may be on a separate sheet of paper, which must be attached to the form covering the transaction.

7. The transferor (seller) of the firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of the Gun Control Act of 1968 (U.S.C., Title 18, Chapter 44) and Title VII, Unlawful Possession or Receipt of Firearms, (82 Stat. 197), and Part 178, Commerce in Firearms and Certain Ammunition, Title 26, Code of Federal Regulations.

8. Upon completion of the firearm transaction, the transferor (seller) must make a part of his permanent firearms records the form recording that transaction and any supporting documents. Forms 4473, Part 1, and any supporting documents must be filed either chronologically by date of transaction, alphabetically by name of transferee (buyer), or numerically by transaction number if the transferor assigns transaction numbers to the forms.

Department of the Treasury
Internal Revenue Service
Alcohol, Tobacco and
Firearms Division

Firearms Transaction Record

Intra-State Over-the-Counter

NOTE: Please read and carefully follow the instructions on the back

Transferor transaction
number

4053 ✓

Section A—Statement of Transferee or Buyer

1. Transferee's (buyer's) name (last, first, middle) (Mr., Ms. Miss) <u>Anderson, Harold Jr.</u>	2. Height <u>5'10</u>	3. Weight <u>170</u>	4. Race <u>Can</u>
5. Address (number, street, city, State, ZIP code) <u>Mountain View - Chester Vermont</u>		6. Date of birth <u>9-21-42</u>	7. Place of birth <u>Waterbury, Conn</u>
8. Certification of Transferee (Buyer)—an untruthful answer may subject you to criminal prosecution. Each question must be answered with a yes or no. a. Are you under indictment in any court for a crime punishable by imprisonment for a term exceeding one year? <u>no</u> b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year.) <u>no</u> c. Are you a fugitive from justice? <u>no</u> d. Are you an unlawful user of, or addicted to, marijuana, or a depressant, stimulant, or narcotic drug? <u>no</u> e. Have you been adjudicated mentally defective or have you ever been committed to a mental institution? <u>no</u> f. Have you been discharged from the Armed Forces under dishonorable conditions? <u>no</u> g. Are you an alien illegally in the United States? <u>no</u> h. Are you a person who, having been a citizen of the United States, has renounced his citizenship? <u>no</u>			

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand

that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

Transferee's (buyer's) signature

Harold Anderson Jr.

Date

3 May 73

Section B—Statement of Transferor or Seller

The person described in Section A, is known to me ☐, or has identified himself to me ☒ in the following manner:

9. Type of identification (driver's license, etc.) <u>Vermont Operators License</u>	10. Number on identification <u>A1A14271839409 2142</u>
--	--

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is

not unlawful for me to sell, deliver, or otherwise dispose of the firearm described below to the person identified in Section A.

11. Type (pistol, rifle, etc.) <u>Revolver</u>	12. Model <u>1A</u>	13. Caliber or gauge <u>38 S&W</u>	14. Serial number <u>3K3242 ?</u>
15. Manufacturer (and importer, if any) <u>Smith & Wesson</u>			

16. Transferor's (seller's) signature <u>J.P. O'Leary - Paul Horn Gundy</u>	17. Transferor's title <u>Owner</u>	18. Transaction date <u>3 May 73</u>
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Department of the Treasury—Internal Revenue Service

EXHIBIT-5(b)

Form 4473 Part I (Rev. 6-70)

Notice:

Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90-351, 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under Chapter 44

may determine if he may lawfully sell or otherwise dispose of a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms.

Definitions

1. **Intra-State Over-the-Counter Transaction**—The sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the State in which the transferor's business is located, occurring on the transferor's business premises.

2. **Published Ordinances**—The publication issued annually by the Director, Alcohol, Tobacco and Firearms Division, which contains the published local ordinances determined by him to be relevant to the enforcement of Chapter 44 of Title 18, U.S.C., which were published in the Federal Register.

Instructions

1. Only one Form 4473, Part 1, is required for each intra-State over-the-counter transaction.

2. All signatures required on this form must be in ink. All other entries on the form must be in ink or be typewritten.

3. The transferor (seller) of a firearm will, in every instance, obtain the information required to complete Section A of the form and have the transferee (buyer) sign the certification in that Section.

4. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business may sign the certification in Section A of the form and attach a written statement, executed under the penalty of perjury, stating

(a) that the firearm is being acquired for the use of and will be the property of that business entity, and

(b) the name and address of that business entity.

5. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

6. If more than one firearm is involved, the identification required by Section B, Items 11 through 15, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than one weapon may be on a separate sheet of paper, which must be attached to the form covering the transaction.

7. The transferor (seller) of the firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of the Gun Control Act of 1968 (U.S.C., Title 18, Chapter 44) and Title VII, Unlawful Possession or Receipt of Firearms, (82 Stat. 197), and Part 178, Commerce in Firearms and Certain Ammunition, Title 26, Code of Federal Regulations.

8. Upon completion of the firearm transaction, the transferor (seller) must make a part of his permanent firearms records the form recording that transaction and any supporting documents. Forms 4473, Part 1, and any supporting documents must be filed either chronologically by date of transaction, alphabetically by name of transferee (buyer), or numerically by transaction number if the transferor assigns transaction numbers to the forms.

Name **THE PRUDER BARN GUN SHOP**

1. License No. 03-1260	2. Expiration Date 9/18/73
3. Employer Identification No. or Social Security No. 000000-0112	4. County Chittenden
5. Class of License	
<input type="checkbox"/> Importer of destructive devices or ammunition for destructive devices <input type="checkbox"/> Importer of firearms other than destructive devices or ammunition for firearms other than destructive devices <input type="checkbox"/> Manufacturer of destructive devices or ammunition for destructive devices <input checked="" type="checkbox"/> Manufacturer of firearms other than destructive devices <input type="checkbox"/> Collector of curios and relics	

6. Issued by Assistant Regional Commissioner, ATF, at
P.O. Box 15, NY, NY 10003

Record Copy of License (18 U.S.C. Chapter 44)

This is a certified copy of a license issued under 18 U.S.C. Chapter 44 authorizing the licensee named hereon to engage in the business as specified in Item 5.

John R. Piper
Assistant Regional Commissioner (Alcohol, Tobacco and Firearms)

John P. & Arlene S. Clancy
The Pruder Barn Gun Shop
Yaff's Corner
Williston, Vermont 05495



EXHIBIT-2

Department of the Treasury
Internal Revenue Service
Alcohol, Tobacco and
Firearms Division



Firearms Transaction Record

Intra-State Over-the-Counter

NOTE: Please read and carefully follow the instructions on the back

Transferor transaction
number

Section A—Statement of Transferee or Buyer

1. Transferee's (buyer's) name (last, first, middle) (Mr., Mrs., Miss)	2. Height	3. Weight	4. Race
5. Address (number, street, city, State, ZIP code)		6. Date of birth	7. Place of birth
8. Certification of Transferee (Buyer)—an untruthful answer may subject you to criminal prosecution. Each question must be answered with a yes or no. a. Are you under indictment in any court for a crime punishable by imprisonment for a term exceeding one year? b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year.) c. Are you a fugitive from justice? d. Are you an unlawful user of, or addicted to, marihuana or a depressant, stimulant, or narcotic drug? e. Have you been adjudicated mentally defective or have you ever been committed to a mental institution? f. Have you been discharged from the Armed Forces under dishonorable conditions? g. Are you an alien illegally in the United States? h. Are you a person who, having been a citizen of the United States, has renounced his citizenship?			

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand

that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

Transferee's (buyer's) signature

Date



Section B—Statement of Transferor or Seller

The person described in Section A, is known to me ☐, or has identified himself to me ☐ in the following manner:

9. Type of identification (driver's license, etc.)	10. Number on identification
--	------------------------------

On the basis of: (1) the statements in Section A; (2) the verification of identity noted in Section B; and (3) the information in the current list of Published Ordinances, it is my belief that it is

not unlawful for me to sell, deliver, or otherwise dispose of the firearm described below to the person identified in Section A.

11. Type (pistol, rifle, etc.)	12. Model	13. Caliber or gauge	14. Serial number
15. Manufacturer (and importer, if any)			

16. Transferor's (seller's) signature	17. Transferor's title	18. Transaction date
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Notice:

Under 18 U.S.C. Chapter 44 and Title VII of Public Law 90-351, 18 U.S.C. Appendix 1201-1203, as amended, firearms may not be sold to or received by certain persons. The information and certification on this form are designed so that a person licensed under Chapter 44

may determine if he may lawfully sell or otherwise dispose of a firearm to the person identified in Section A, and to alert the transferee (buyer) of certain restrictions on the receipt and possession of firearms.

Definitions

1. **Intra-State Over-the-Counter Transaction**—The sale or other disposition of a firearm by the transferor (seller) to a transferee (buyer), who is a resident of the State in which the transferor's business is located, occurring on the transferor's business premises.

2. **Published Ordinances**—The publication issued annually by the Director, Alcohol, Tobacco and Firearms Division, which contains the published local ordinances determined by him to be relevant to the enforcement of Chapter 44 of Title 18, U.S.C., which were published in the Federal Register.

Instructions

1. Only one Form 4473, Part 1, is required for each intra-State over-the-counter transaction.

2. All signatures required on this form must be in ink. All other entries on the form must be in ink or be type-written.

3. The transferor (seller) of a firearm will, in every instance, obtain the information required to complete Section A of the form and have the transferee (buyer) sign the certification in that Section.

4. When the transferee (buyer) of a firearm is a corporation, company, association, partnership or other such business entity, an officer authorized to act on behalf of the business may sign the certification in Section A of the form and attach a written statement, executed under the penalty of perjury, stating:

(a) that the firearm is being acquired for the use of and will be the property of that business entity, and

(b) the name and address of that business entity.

5. The transferor (seller) of a firearm will, in every instance, complete Section B of the form.

6. If more than one firearm is involved, the identification required by Section B, Items 11 through 15, must be provided for each firearm. The identification of the firearms transferred in a transaction which covers more than one weapon may be on a separate sheet of paper, which must be attached to the form covering the transaction.

7. The transferor (seller) of the firearm is responsible for determining the lawfulness of the transaction and for keeping proper records of the transaction. Consequently, the transferor should be familiar with the provisions of the Gun Control Act of 1968 (U.S.C., Title 18, Chapter 44) and Title VII, Unlawful Possession or Receipt of Firearms, (82 Stat. 197), and Part 178, Commerce in Firearms and Certain Ammunition, Title 26, Code of Federal Regulations.

8. Upon completion of the firearm transaction, the transferor (seller) must make a part of his permanent firearms records the form recording that transaction and any supporting documents. Forms 4473, Part 1, and any supporting documents must be filed either chronologically by date of transaction, alphabetically by name of transferee (buyer), or numerically by transaction number if the transferor assigns transaction numbers to the forms.

DEFENDANT'S MOTION FOR JUDGMENT OF
ACQUITTAL AT THE END OF THE GOVERNMENT'S CASE

THE COURT: All right.

MR. COOK: The Government rests, your Honor.

THE COURT: Very well, the Government rests. (3:32P.M.)
Is the Defendant ready to proceed?

MR. CLEVELAND: May we make our Motion at this time?

THE COURT: Yes.

MR. CLEVELAND: At this time the Defendant moves for acquittal and as the Government has not brought forth sufficient evidence on the Indictment to satisfy the requisite elements of the crime. Leave it there.

THE COURT: Motion for Directed Verdict of Acquittal is denied.

(T.338-339)

THE DEFENDANT RENEWED HIS MOTION FOR JUDGMENT
OF ACQUITTAL AT THE END OF THE GOVERNMENT'S
CASE WITH SPECIFICITY

MR. CLEVELAND: Your Honor, the Defendant moves for a Judgment of Acquittal because of the Government's failure to identify the defendant as the JOHN P. CLEARY that has been named in the testimony of the Government's witnesses.

During their testimony, Special Agent Richard DOTCHIN, Paul FLYNN and Detective Trooper ANDERSON never identified the Defendant as the JOHN CLEARY mentioned in their testimony.

The testimony of Special Agent Richard DOTCHIN, Paul FLYNN and Detective Trooper Harold ANDERSON was the only testimony introduced by the Government before it rested, relating

to the alleged sale of firearms in the Indictment, on May third, 1973.

Both counts of the Indictment are based on the sale of firearms alleged to have occurred on May third, 1973. At no time has the Government identified the defendant as the JOHN P. CLEARY named in the Indictment.

(T. 367-368)

RENEWAL OF DEFENDANT'S MOTION FOR
ACQUITTAL AT THE END OF ALL OF THE
EVIDENCE AND DEFENDANT'S MOTION FOR MISTRIAL

MR. CLEVELAND: Your Honor, I would like to renew the Motion I made yesterday that a Judgment of Acquittal be entered on the grounds of non-identification of the witness at that time for the reasons stated which I stated at that time.

I would also like to make a motion that there be a mis-trial on the grounds that the evidence allowed in by the Court and subsequently put in the, put in by the prosecutor, regarding a New Jersey killing, is highly prejudicial and has no bearing on the case at hand and should be excluded.

I would further make a Motion for Judgment of Acquittal at this time for insufficient proof put forward by the prosecution, insufficient to prove the elements of the crime and in a prima facie case.

(T. 698-699)

MOTION FOR JUDGMENT OF ACQUITTAL NOTWITHSTANDING
THE VERDICT OR IN ALTERNATIVE FOR A NEW TRIAL

Defendant, John P. Cleary respectfully moves the Court to grant judgment of acquittal notwithstanding the verdict, or in the alternative a new trial for the following reasons:

1. The Court erred in denying the motion of the Defendant for a judgment of acquittal based on the Government's failure to properly identify the Defendant, as the John P. Cleary named in the indictment on the day of the alleged sale.
2. The Court erred in denying the motion of the Defendant for a judgment of acquittal based on the failure of the Government to introduce evidence legally sufficient to sustain a verdict of guilty.
3. The Court erred in instructing the jury that they could not find that a sale had technically been to the "individual" who signed form #4473.
4. The Court erred by indicating that the Defendant had delivered the guns in question to agents Flynn and Dotchin.
5. The Court erred by allowing the Government to refer to a serious shooting in New Jersey that involved a gun sold in the Defendant's shop. This reference was irrelevant and highly prejudicial to the Defendant.
6. The Court erred in denying the Defendant's several motions for a mistrial and Judgment for Acquittal.

Dated at Essex Junction, Vermont, this 1st day of August, 1973.

/s/ Peter M. Cleveland
Peter M. Cleveland, Esq.
Attorney for John P. Cleary

COURT'S INSTRUCTIONS

Now, in order to sustain the charges in each of the two counts of the Indictment, the Government must establish each of the following essential elements, beyond a reasonable doubt, as to each count.

First, that the Defendant clearly is a Federally licensed retail gun dealer. Secondly, that on or about May third, 1973, the Defendant CLEARY sold and delivered the firearms described to Richard C. DOTCHIN, that is the firearms described in Count One, as to Richard DOTCHIN, and the firearms described in Count Two, as to Paul B. FLYNN.

Thirdly, that the Defendant CLEARY knew or had reasonable cause to believe that DOTCHIN and FLYNN did not reside in the State of Vermont and lastly, that the Defendant, CLEARY, acted knowingly and wilfully.

Now, as to the first elements, there is little, if any dispute the Government has introduced testimony and the record of license showing that John P. CLEARY is a Federally licensed gun dealer doing business at the Powderhorn Gun Shop in Williston and the Defendant in his testimony has substantially conceded this. Nevertheless, because the Government has the burden of proving each and every element of the offense beyond a reasonable doubt, you must still find that this element has been satisfied.

As to the element of the second element, which is in dispute, I instruct you that you must find, beyond a reasonable doubt, that the Defendant sold the firearm in question to the named persons and that he delivered the firearm to the persons so named.

I further instruct you that in applying the words "sell and deliver," you must use your good common sense and not

apply any technical interpretation of those words to them. To "Sell" of course, means to transfer to another for a price. Usually to be paid in money. And, to "Deliver" means to transfer possession voluntarily from one person to another.

In the case of a sale from the buyer to the seller. The fact that a Vermont resident actually signed the firearms transaction records, does not necessarily mean the gun was technically sold to him. You must examine all of the circumstances surrounding the transaction, including who negotiated the purchase, provided the funds, and took possession and delivery and for whom the beneficial use of the weapon was intended, in order to determine to whom the sale was actually made.

(T. 802,803,804)